84-566

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.____

TIMOTHY O'LEARY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, the due process clause of the Fifth Amendment to the Constitution of the United States and Rule 404 of the Federal Rules of Evidence requires that evidence of prior uncharged and uncorroborated bad acts be admissible only if the trial court first makes a threshold determination of admissibility based on some articulated standard as "clear and convincing", or "substantial" that it is probable that the party against whom the acts are offered actually committed those acts.

II. Whether the split in the Circuits should be resolved to determine the appropriate standard to be utilized by the trial court

in determining the admissibility of prior uncharged and uncorroborated bad acts.

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. Timothy O'Leary and Darryl Bazner, Timothy O'Leary, Appellant, at No. 84-3050. Petitioner's co-defendant below entered into a plea agreement with the United States from which no appeal was taken.

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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an Opinion and Judgment on July 19, 1984. A copy of the Opinion is contained in the Appendix at pp. 3a-9a. A copy of the Judgment is contained in the Appendix at pp. 1a-2a.

The United States Court of Appeals for the Third Circuit issued an order denying a Petition for Rehearing En Banc on August 30, 1984. A copy of the order is contained in the Appendix at pp. 10a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 19, 1984. Petitioner submitted a Petition for Rehearing En Banc on August 2, 1984. The United States Court of Appeals for the Third Circuit denied the Petition for Rehearing in an order dated August 30, 1984.

The judgment of the United States Court of Appeals for the Third Circuit is thus final with respect to the issues presented here. There exists a division of opinion upon these issues among the Courts of Appeals for the various circuits. The issues are therefore ripe for review.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Rule 404(b) of the Federal Rules of Evidence provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Procedural

On September 19, 1983 a federal Grand Jury for the Western District of Pennsylvania indicted Petitioner Timothy O'Leary, ("Petitioner"), and one Darryl Bazner, ("Bazner"), with one count of conspiracy to distribute cocaine in violation of 21 United States Code Section 846, and 5 counts of possession with intent to distribute, and distribution of cocaine, in violation of 21 United States Code Section 841 (a)(1) and 18 United States Code Section 2. The conspiracy was alleged to have existed from approximately June 1, 1983 until September 15, 1983.

On October 20, 1983, Bazner entered into a plea agreement with the United States of America by the terms of which he pled guilty to the conspiracy count and one count of possession with intent to distribute and distribution.

After a jury trial before the Honorable Carol Los Mansman, District Judge, Western District of Pennsylvania, on November 30, 1983, Petitioner was convicted only of the conspiracy count and acquitted of all the substantive counts.

On January 23, 1984 Petitioner appealed his conviction to the Third Circuit Court of Appeals, which affirmed his conviction. Petitioner's request for a rehearing en banc on the grounds that a division among the circuits existed upon the issue raised in this Petition for Writ of Certiorari was denied. This Petition followed.

Background

On June 2, 1983 Detective Robert McKeon, of the Allegheny County Police Department, working in an undercover capacity, purchased cocaine from Bazner.

In all, McKeon made five (5) separate cocaine purchases of cocaine from Bazner. After the initial

purchase, each subsequent buy was initiated by a telephone call from McKeon to Bazner. These calls, none of which referred to Petitioner by name, were intercepted by the Allegheny County Police Department and subsequently introduced at Petitioner's trial.

For each of the cocaine purchases, the County Police conducted surveillance of Bazner, of his residence, and of Petitioner's residence in an attempt to verify that Petitioner was the source from whom Bazner was purchasing the cocaine. Despite extensive surveillance police could not confirm that Petitioner was Bazner's source of cocaine, and with respect to at least one transaction, contradicted it.

On September 9, 1983 Bazner was arrested and immediately began to cooperate with the authorities. At the behest of the police Bazner made two telephone calls to Petitioner, one on

September 9, 1983 and a second, on September 15, 1983. Both telephone calls were recorded by the police and the transcripts of the calls were introduced by the prosecution at trial. As the Court of Appeals noted, (Appendix, p. 5a), Petitioner made no statements during those phone calls which directly tied him to the drug transactions.

At trial, over objection, Bazner was allowed to testify to approximately twenty (20) instances when he allegedly purchased cocaine from Petitioner prior to the date of the conspiracy as set out in the indictment. This testimony was uncorroborated. The prosecution offered the testimony to bolster Bazner's credibility with respect to his "identification" of Petitioner as the source of his cocaine.

In any event, the jury acquitted petitioner of all of the alleged substantive transactions with

Bazner charged in the indictment, but convicted him of conspiracy to dispense drugs, either for these same transactions or the uncharged ones antedating the indictment.

ARGUMENT

ISSUE I.

The evidence admitted against O'Leary consisted almost entirely of the uncorroborated testimony of Petitioner's alleged accomplice, Darryl Bazner.

In an effort to boost Bazner's credibility the government offered uncorroborated testimony by Bazner of Petitioner's alleged involvement in approximately 20 prior drug deals, for which neither Bazner nor Petitioner was charged. This, the prosecution argued, was a permissible use of evidence of prior criminal acts in order to establish identity, or concert of action, as allowed by Federal

Rule of Evidence 404(b).[1]

We take it to be undisputed that Rule 404 permitting evidence of prior, uncharged criminal acts is admissible if, and only if, the prosecution can demonstrate that the person against whom the evidence is offered did, in fact, commit those acts.

The Court of Appeals for the Third Circuit did not address this issue foursquarely. It merely held that if evidence of other crimes meets the two-prong test elaborated by the Third Circuit in United States v. Goichman, 547 F.2d 778 (1976), the evidence is admissible if accompanied by

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1. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

appropriate limiting instructions. This test requires the trial court to determine, first, if the evidence is relevant to a matter at issue, and second, if the relevance of the evidence outweighs the prejudicial effect upon the defendant.

Ordinarily this two-pronged test is adequate. In the main, as in Goichman,[2] the evidence of other crimes will consist of material sufficient to establish that the defendant did commit the acts alleged.

But in the case sub judice, where the evidence of the other crimes consisted solely of the uncorroborated testimony of the Petitioner's alleged accomplice, the test must be expanded, as the Tenth Circuit recently found in United States v. Shepherd, 739 F.2d 510 (1984).

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2. The evidence of other crimes in Goichman consisted of bank records and the work papers of Defendant's accountant.

Shepherd presented the Tenth Circuit with the only case

> we have seen in which the prosecution depended entirely upon the uncorroborated testimony of an accomplice to proved defendant's involvement in the charged crime and then attempted to utilize the uncorroborated testimony of the same accomplice to show defendant's involvement in prior crimes.

Id. at 513.

The precisely defined issue in Shepherd, as here, is whether the Petitioner was a participant in the uncharged crimes as to which evidence is admitted. The key question for the jury in both cases was the credibility of the accomplice. In Shepherd, as here, the trial court allowed the alleged accomplice to enhance his own credibility by his own testimony without any corroboration.

The conclusion of the Tenth Circuit Court of Appeals was that admission of such evidence constituted reversible error.

> We conclude that [the accomplice's] testimony linking defendant to prior criminal acts added very little probative value to his testimony linking defendant to the charged crime **because there was no other evidence to corroborate that link.** The evidence of other crimes was prejudicial and fraught with the possibility of diverting the jury's attention from the crucial issue, whether [the accomplice's] testimony that defendant was his accomplice was credible.

Id. (Emphasis added).

The Court's conclusion states a self-evident proposition: that evidence of other crimes is relevant only if it is true that the defendant committed those acts. The Third Circuit two-prong test of Goichman, supra, makes the inappropriate assumption that the evidence is valid, at least in the instant circumstance.

The government's entire case was the product of Bazner's cooperation pursuant to his plea bargain. Bazner first attempted to generate physical evidence of Petitioner's involvement by telephoning

him and initiating incriminating phone calls, which calls were intercepted by the police. But, as the Court of Appeals noted, the Petitioner failed to make any statement which would directly link him to the crimes charged.

Whether because of Bazner's contradiction, or lack of corroboration of his version given in his own self interest, the jury acquitted Petitioner of all substantive counts, thus prompting the very real prospect that the uncharged crimes influenced a jury finding that a conspiracy between the Petitioner and Bazner nevertheless existed.

Those Courts of Appeals which have considered this issue agree that it is the task of trial court to determine if there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense. Those circuits include the Seventh, United States v. Shackleford, 738 F.2d 776 (7th Cir.,1984), the Eighth, United

States v. Frederickson, 601 F.2d 1358 (8th Cir., 1979)[3], the Ninth, United States v. Bronco, 597 F.2d 1300 (9th Cir., 1979) and the Court of Appeals for the District of Columbia, United States v. Shelton, 628 F.2d 54 (D.C. Cir., 1980), all of which would require the evidence to rise to the level of 'clear and convincing' prior to a finding of admissibility.

The Fifth Circuit, while rejecting the clear and convincing standard as too stringent, nonetheless finds it "obvious" that the trial court must make a factual determination that the defendant committed the extrinsic offense, United States v. Beechum, 582 F. 2d 898, 913 (5th Cir., 1978).

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3. The Eighth Circuit adds a further requirement that the extrinsic offense be "similar in kind and reasonably close in time" to the charged crime. United States v. Bledsoe, 531 F.2d 888, 891 (8th Cir., 1976).

The Tenth Circuit, while not defining the standard for admissibility overall, found that in the limited context of the Shepherd case, supra, "some evidence", independent of the cooperating witness, must be presented before the evidence of extrinsic offenses reaches the jury.

Given the inherently prejudicial nature of evidence of extrinsic offenses, Michelson v. United States, 335 U.S. 469 (1948), due process requires vigilance against the insidious contamination of a trial with uncharged criminal acts which only a uniform standard of admissibility in the Circuits can prevent.

Plainly, the trial court had no such standard in mind and to the extent the Third Circuit has expressed its "other crimes" standard in U. S. v. Goichman, supra, it differs from other Circuits.

ISSUE II.

Petitioner argued both at the trial level and before the Court of Appeals that the standard for admissibility of the evidence of extrinsic offenses should be the 'clear and convincing' standard as adopted by the Courts of Appeals of the Seventh, Eighth, Ninth and D.C. Circuits. Such a stringent standard is necessary given the inherently prejudicial effect of evidence of other crimes.

> The plain fact is that many people think there is a criminal "type" who not only has a bad "character", but everything that goes with it—bad intentions, bad motives, bad plans, etc. This kind of thinking is inimical to the principles of due process and presumed innocence that dignify our criminal system.

United States v. Beechum, supra, 582 F. 2d at 923, n.17.

Only the Fifth and the Third Circuits do not have the clear and convincing standard for admissibility. The Third Circuit actually has none In Beechum, supra, the Fifth Circuit concluded that the clear and convincing standard unfairly

highlighted the extrinsic offense in the minds of the jury and might even be counterproductive.

> Demanding that the Government prove by excessive evidence each physical element of the extrinsic offense does not necessasrily enhance its probative value and may in fact increase its unfair prejudice. One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense....This danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction: the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged. Moreover, even if the jury is no more disposed to punish the accused for his unpunished past crimes, 'over-persuasion' may lead them to conclude that, having committed a crime of the type charged, he is likely to repeat it.

Id. at 914.

Instead, as the Fifth Circuit defines it, evidence of extrinsic offenses is admissible if a jury might "reasonably find" the evidence to be valid. Id. at 913.

Such a standard is obviously lower than "clear and convincing" but still significantly higher than the Third Circuit test, which in the final analysis is no test at all. In the Third Circuit the evidence is admitted subject to the jury's assessment of the credibility of the witness.

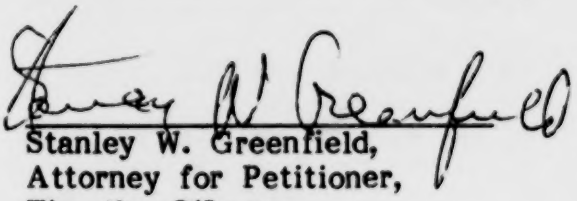
Whatever the standard however, even handed justice should not depend on the fortuity of the Circuit in which one lives or the alleged offense occurs.

CONCLUSION

To resolve the different standards in the Circuits and establish a uniform one to preclude denial of due process by the admission of uncorroborated evidence of other crimes, this Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

GREENFIELD & MURTAGH



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Dated: October 5, 1984

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 5th day of October, 1984, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID:

1. Rex E. Lee
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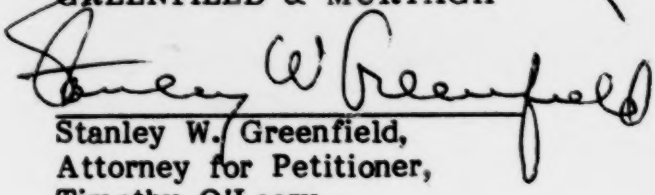

Stanley W. Greenfield,
Attorney for Petitioner,
Timothy O'Leary

SWORN to and subscribed before me

this 5th day of October, 1984.

_____
Notary Public

My Commission Expires:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3050

United States

v.

Timothy O'Leary and Darryl Bazner
Timothy O'Leary,
Appellant.

On Appeal from the United States
District Court for the Western
District of Pennsylvania

(D.C. Criminal No. 83-142
District Judge: Hon. Carol Los Mansmann)

Before: HIGGINBOTHAM and SLOVITER,
Circuit Judges,
and GREEN, District Judge

(July 19, 1984)

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the

Wester District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on July 10, 1984.

On consideration hereof, it is now here ordered and adjudged by this court that the judgment of the said District Court entered January 16, 1984, in Criminal Number 83-142, appealed here, be, and the same is, hereby affirmed.

/s/Sally Mrvos
Sally Mrvos
Clerk

Dated: July 19, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3050

UNITED STATES

v.

TIMOTHY O'LEARY and DARRYL BAZNER

Timothy O'Leary,
Appellant.

Submitted Under Third Circuit Rule 12 (6)
July 10, 1984
Before: HIGGINBOTHAM and SLOVITER, Circuit Judges and GREEN, District Judge*

(Opinion Filed July 19, 1984)

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Pittsburgh, PA 15219

Attorney for Appellant

---

*Hon. Clifford Scott Green, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

J. Alan Johnson
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Pittsburgh, PA 15219

Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Appellant Timothy O'Leary, who was convicted by a jury of conspiracy to distribute cocaine in violation of 21 U.S.C. §846, contends that the trial court erred in allowing his co-conspirator to testify to numerous earlier transactions of purchases of cocaine from O'Leary. We find no error, and will affirm the judgment of conviction.

I.

An undercover agent of the Allegheny county Police Department made five purchases of cocaine

from Darryl Bazner between June 2, 1983 and August 4, 1983. Bazner was arrested on September 9, 1983, agreed to cooperate with the authorities, and identified O'Leary, then a police officer for the Borough of Baldwin, near Pittsburgh Pennsylvania, as his source. Bazner made two recorded telephone calls to O'Leary on September 9 and 15 during which O'Leary made no statements directly tying him to the drug transactions but stated "they ain't got nothing on me." "I think we all got in over our heads." App. at 23B, 32B, 29B. O'Leary was arrested on September 19, 1983, and police found $870 in cash in the house and 7 grams of hashish, 1/2 gram of cocaine and some drug-related paraphernalia in the car.

O'Leary was charged with conspiracy to distribute cocaine beginning on or about June 1, 1983 until approximately September 15, 1983. He also was charged with five substantive counts of

possession with intent to distribute and distribution, but was acquitted by the jury on these counts. At trial, Bazner testified, over objection, as follows:

> Q. During the last couple of years, what has been the nature of your contact with Timothy O'Leary?
>
> A. The purchase of some drugs.
>
> Q. What ordinarily would it be?
>
> A. Cocaine.
>
> Q. Darryl, when did the purchases of cocaine from Timothy O'Leary begin?
>
> A. About a year ago.
>
> Q. And during the period from a year ago when that began until the time you were arrested, approximately how many times had you bought cocaine from Timothy O'Leary?
>
> A. About 20 times.

App. at 12A. O'Leary contends this testimony constituted inadmissible evidence of other crimes. The standard by which we review a trial judge's

decision to admit evidence of uncharged offenses is abuse of discretion. United States v. Lebovitz, 669 F.2d 894, 901 (3d.Cir.), cert. denied, 102 S.Ct. 1979 (1982); United States v. Long, 574 F.2d 761, 767 (3d Cir.), cert. denied, 439 U.S. 985 (1978).

II.

Rule 404(b) of the federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The government contends that the challenged evidence was needed to "show the background of the charges, the parties' familiarity with one another, and their concert of action." Brief of Appellee at 10. These constitute permissible purposes for admission of such testimony under rule

404 (b). In United States v. Lebovitz, 669 F.2d at 902, we upheld the trial judge's admission of previous criminal accusations aginst the defendant when they were similar to the crimes accused and proximate to them in time.

Notwithstanding the admissibility of the evidence the trial court must also consider its prejudice. Under Rule 403 of the Federal Rules of Evidence,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...or needless presentation of cumulative evidence.

Here, the trial judge made the balancing in her ruling explicit, stating:

> I think that there is no question in my mind that the evidence is relevant, that it is probative, and I think that the substantial relevance test here really outweighs the prejudicial value.

We cannot hold the trial judge abused her discretion.

Furthermore, in her charge to the jury, Judge Mansmann reminded the jury that O'Leary was not charged with the prior acts, and cautioned the jury to use the prior acts only to show "the identity of the defendant, his knowledge, and possibly a plan or a scheme devised." App. at 19B. In clearly explaining to the jury the narrow way in which to use the evidence, the trial court lessened any possibility of prejudice.

For the foregoing reaons, we will affirm the judgment of conviction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3050

United States

v.

Timothy O'Leary and Darryl Bazner
Timothy O'Leary,
Appellant.

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, Seitz, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, Circuit Judges, and Green, District Judge*

The petition for rehearing filed by Appellant, Timothy O'Leary, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: August 30, 1984

*Hon. Clifford Scott Green, United States District Court for the Eastern District of Pennsylvania, sitting by designation.